



## I. FISHERIES GOVERNANCE

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*The following is a synopsis of the panel presentations and discussions, and does not necessarily represent the views of individual panelists.*

SYNOPSIS WRITTEN BY JAY GINTER

**The Magnuson-Stevens Fishery Conservation and Management Act** (MSA) of 1976 established a new era of managing marine fisheries. A central purpose of the Magnuson-Stevens Act was, and continues to be, "...to conserve and manage the fishery resources found off the coasts of the United States..." Congress envisioned this purpose, among others, to be accomplished through the work of a new suite of eight advisory bodies called Regional Fishery Management Councils. The purpose of this panel was to evaluate how well has this system of governance worked, and examine where improvements could be made.

To begin, recognition was given to the distinction between "governance" and "management." Governance refers to the entire process by which laws, procedures and institutions address fisheries issues. This process includes the entire range of activity from stakeholders representing their concerns to Councils, through the Councils developing and analyzing policy alternatives, choosing a preferred policy, developing implementing regulations, and enforcing them, while also contending with the intervention of courts, state legislatures, and Congress. Management, on the other hand, refers to the ministerial process of carrying out a Council's approved management policies through rule implementation, monitoring and enforcement. Hence, governance may include management but the two are not the same. Councils are more part of governance than management but, as they exist at the frontier between the two, Councils arguably have a foot in each camp.

One indicator of how well the Council form of fisheries governance has worked is the conservation of fishery stocks under Council jurisdiction. The results are mixed, with some Councils maintaining a good record of conservation, and other Councils having more difficulty achieving conservation objectives. Overall, most fishery stocks are not overfished and overfishing is being prevented or curtailed. Rebuilding plans have been developed by the Councils for overfished stocks or to prevent overfishing, and have been successful in some cases. In other cases, however, overfishing has been

allowed to occur or continue and new overfished stocks have been identified based on the definitions of “overfishing” and “overfished” developed by the Councils to protect these stocks. Other conservation-related challenges include protecting the habitat essential to important species, and limiting the effect of fisheries on species protected under the Endangered Species Act.

From a social and economic perspective, another measure of success is the health of the fishing industry (commercial and recreational) and its contribution to the economies of national and local fishing communities. Economic growth in the harvesting sector, of course, is limited by the finite amount of fish that may be harvested from any stock without damaging its future productivity. Having more harvesting capacity than is necessary to take the amount of fish that may be safely harvested is economically wasteful. Nevertheless, this condition continues to afflict most of the Nation’s fisheries. Most Councils have not been able to successfully treat the inherent inefficiencies of open access fisheries due to the real and perceived social costs on fishing communities of limiting access. While rights-based management regimes have demonstrated benefits, like all fishery management policies, they produce winners and losers. Moreover, rights-based systems are no panacea for all fishery management issues. Indeed, while a rights-based regime may resolve some issues, it likely will create new issues and exacerbate others.

Panel discussion focused on several concerns relating to the structure and operation of the Councils.

## SEPARATING SCIENTIFIC FROM ALLOCATION DETERMINATIONS

The Regional Councils are essentially political organizations. Their job is to make policy decisions about the management of fisheries. Frequently, these decisions are made with insufficient scientific information, but with an abundance of public testimony on what people want. Weighing the competing interests of a Council’s stakeholders — commercial, recreational, environmental — produce difficult choices. This is inherently political work as the “right” choice for one stakeholder may be the “wrong” choice for another. These choices may be easier if the oceans produced an unlimited supply of the desired fish species, but of course, this is not realistic.

An emerging theme is that questions of how much fish should be harvested should be based strictly on scientific data and applicable theory and not be subject to political persuasion. Advocates of this theme contend that the statutory mandate to conserve takes precedence over the need to maximize yield. Moreover, Council members selected for their broad understanding of fisheries and constituent support are rarely trained as fishery scientists and therefore may be more persuaded by political arguments than scientific ones. Additionally, some appointed members have direct financial interests in the fisheries, or represent fishing industries. Faced with inevitable uncertainty of the scientific

*“Because the Regional Fishery Management Council structure contains so many of the characteristics that the Commission believes are important, even though there are undeniable problems with the system, our approach has not — and I emphasize that — has not been to focus on wholesale changes to the Councils or replacement with a new management construct. Instead, the Commission’s recommendations seek to substantially strengthen the Council and Interstate Commission structure and processes.”*

PAUL SANDIFER



Participants at the *Managing Our Nation’s Fisheries* conference, November 2003.



Western Pacific Council hosts a fish fry.

*“We want some separation between science and management, so that the science is undisputably peer-reviewed, objective science. We also want the science to be responsive to management needs. Everybody in here who’s working in fishery management knows we need the science to support us. That’s still going to happen.”*

REBECCA LENT

*“I see the mad rush to make ecosystem management the icon of fisheries management in the future. Ecosystems are a very sound concept, but let me remind you the old saying that the devil is in the details, and it certainly is with ecosystem management.”*

JIM GILFORD

evidence, Council members may be more likely to err on the side of more harvest than to take the precautionary approach of less harvest.

To fix this problem of political pressure overriding scientific advice, some would recommend separating the decision of how much of a fish stock to harvest from the decision of who should enjoy the benefits of that harvest, i.e., the allocation decision. Some believe this could be done by a change in the Magnuson-Stevens Act to require the Scientific and Statistical Committee (SSC) of a Council to set the harvest policy for each stock,

based on the best scientific information available and ample peer review, which could not be changed by the Council. Alternatively, separation of biological conservation and allocation decisions could be done by requiring conservation decisions to be made by NOAA Fisheries, based on recommendations from science and technical teams whose work would be subject to peer review.

Detractors of this separation theme, however, argue that the effect would be to focus political pressure on the SSC or the scientific body making the harvest policy decisions. Science (not just fisheries science) often involves different interpretations, assumptions and theories. The building of a consensus as to which of these scientific interpretations, assumptions and theories is superior would become itself a political process. Advocates for more harvest and those for more conservation would forward scientific positions complete with data and analyses to promote their respective arguments. Nevertheless, because qualified scientists would be evaluating the respective arguments, data sets and analyses, rather than those without scientific knowledge (and in some cases vested interests in particular outcomes), proponents of the separation theme believe that this process would result in better decisions on setting catch limits.

## COUNCIL MEMBERSHIP

The Magnuson-Stevens Act requires the non-agency members of a Council to be appointed by the Secretary of Commerce from a list of qualified individuals submitted by the Governor of each applicable constituent state. As a consequence, some believe that the Secretary may not have an adequately balanced slate of nominees from which to select Council members, and the public’s interest in the fishery resources may not be adequately represented. Those who hold this view would argue bias in Council membership in favor of either commercial or recreational harvesting. Environmental concerns, protected species conservation, and habitat protection may have been given lower priority as a result. Political bias may not be limited to extraction versus conservation, however, as some commercial (or recreational) groups may perceive that their preferred positions on some issues lack critical votes on a Council.

To address this problem, one panelist recommended broadening Council representation to provide for greater balance on the Councils. Governors could be required to nominate a balanced slate of individuals that includes not only commercial and

recreational fishing interests, but also members of the general public without a fishing industry interest, including conservation groups. Nominations also could come to the Secretary from an independent body, such as the National Academy of Sciences, rather than having all nominations come through the Governors.

Another reform advocated by one panelist is to apply the same financial conflict of interest standards to the Councils that apply to other government decision-makers. Under the MSA, a Council member is free to vote on a management action unless the member enjoys an expected and substantially disproportionate benefit...relative to the financial interests of other participants in the same gear type or sector of the fishery. Under NMFS regulations, only if a Council member's interest is greater than 10% must they recuse themselves. As a result, Council members are allowed to vote on matters in which they have some financial stake.

A concern raised by the perceived bias of a Council's membership is that stakeholders who do not get what they want through the Council system then take recourse through the courts or Congress to achieve their desired policy outcomes. These "end runs" around the Council process of setting fishery management policy, some would argue, indicate a breakdown of this governance system. Another potential breakdown stems from political pressure on state fisheries directors or other Council members who may be seeking re-nomination to a Council from their respective state governors. A state governor, it could be argued, has an exceptional degree of political influence over his or her fisheries director who has a voting position on a Council and over other incumbent Council members who wish to be reappointed for a second or third three-year term. Hence, the political forces affecting a governor may be directly relayed to effect a Council decision that may otherwise have been different without real or implied gubernatorial intervention. Regardless of whether intervention in Council policymaking comes from Congress or a state governor, the result is the same. That is, Council policies could potentially reflect less the perspective of regional stakeholders and more the perspective of a few with exceptional political influence.

The views represented in the panel discussion of this and related issues suggested alternative perspectives. One view is that politics are a fact of Council life. Councils are, after all, political organizations that make policy concerning public resources. Virtually any Council decision will produce winners and losers. On any particular issue before a Council, the backgrounds of Council members may suggest a predisposition. The antidote to this tendency is to assure that scientifically based analyses are presented and that Councils have a rational basis for the decisions they make. The greater the public perception is that Council decisions are scientifically and rationally based, the less likelihood there is that stakeholders will mount "end runs" on Council decisions.

*"One of the most fundamental challenges that the Councils face is the undeniable social context of fisheries management. We constantly face the tug and pull between our biological objectives and responsibilities under the Act and the resulting impacts that are felt by the participants within the fisheries and the communities we deal with."*

TOM HILL



Public participation is vital to the process.

*"We believe the single most important thing that could be done to improve fisheries management in this country is to reform the governance structure."*

SARAH CHASIS





*“End runs... consisting of litigation and Congressional intervention... reflect some flaws in our overall governance structure that need to be addressed. If the system was perceived as legitimate and working well, this phenomena of end runs would go away or at least be significantly reduced.”*

JOHN SUTINEN

*“It was time to have a national forum and a national debate, bring all the folks to the table and talk the issues out, and do it in an open manner. That’s what the Council process does. We’re not afraid of that. We’re not afraid to be criticized. And we’re not afraid to accept the fact that maybe we’ve actually done a few things right.”*

DAVID BENTON

Litigation has been effective in reinforcing a conservation and environmental ethic in the outcome of Council actions, while Congressional intervention (outside of re-authorization statutes) or gubernatorial intervention has focused more on allocation issues. Mounting one of these “end runs,” however, can be costly. Courts are reluctant to second guess the expertise of the Secretary in implementing fishery policy and Congress would prefer for fisheries issues to be resolved by the Councils. However, NOAA Fisheries has lost some cases in recent years because the Magnuson-Stevens Act requirements or NEPA regulations have not been adequately addressed.

Another potential antidote to undue political pressure on Council members is to create incentives to better align the economic interests of stakeholders in a fishery with the broader long term public interest in conservation. Some panel discussion suggested that certain rights-based fisheries management regimes, in which fishermen hold long-term harvesting privileges, would reform short-term perspectives characteristic of open access management regimes. A fisherman who buys his way into a fishery through the purchase of a share of the overall quota, for example, is less likely to support aggressive fishing mortality policies that keep stocks depressed because an abundant stock in the future would add value to his quota share.

## LEGAL IMPLEMENTATION REQUIREMENTS

To be approved by the Secretary, a recommended Council policy must be consistent with the MSA and other applicable law. The “other applicable law” requirement includes roughly a dozen statutes and a half dozen Presidential executive orders. A common frustration of Councils is that the process of developing the analyses and associated paperwork to satisfy all applicable requirements severely impedes the implementation of their desired policies. The elapsed time from Council recognition of a management problem through development of a recommended policy to the Secretary to implementation of rules may now exceed two years or more.

Requiring Councils to stop and think about the potential effects of a recommended action on the fish, habitat and people is not a bad idea. Some panel members, however, sought relief from some of these statutory requirements, or wanted improved Council member training on how best to deal with them. Under the NOAA Fisheries regulatory streamlining initiative, more of the analytical and regulatory work would be completed by the Councils and reviewed by NOAA Fisheries early in the process. This should not only speed Council submitted documents through the Secretarial review process but also increase public involvement and transparency in the Council process of developing policy.

## SUMMARY

Panel discussion indicated that some believed no changes were needed in the current system of governance involving Councils as the principal developers of fishery management policy. Others suggested minor changes to improve the process, while others would have more major changes. The changes suggested would range from the integration of science into harvest policy decisions (such that scientific advice would be more resilient in the face of political pressure to exceed science-based levels) to altering the role and composition of the Councils. A complete restructuring of the current Council system of governance, however, likely would be too costly and confusing for the public. One panelist suggested that, while each of the component parts of the system, like an orchestra, may play different instruments, with cooperation they combine to make beautiful music.

The need for more scientific work on the interaction of species in fisheries also was highlighted as we move into ecosystem-based management regimes. The growing recognition of environmental concerns of the public interest in fishery resources also is having an effect on Council recommendations. This is partly in response to a growing presence of environmentally concerned stakeholders and partly in response to the 1996 amendments to the Magnuson-Stevens Act. Overall, this is likely a positive development as increased public participation at the regional level likely will stimulate investments in scientific inquiry while challenging old paradigms. ▀

*“The fisheries management system is not broken.”*

TERRY LEITZELL



Panel participants at the *Managing Our Nation's Fisheries* conference, November 2003.